(1) Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2003

LUIS CANO
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the provisions of 21 U.S.C. §848(b) create a separate offense from that defined in §§848(a),(c), such that the Due Process Clause of the Fifth Amendment and the right to trial by jury and notice requirements of the Sixth Amendment require that its elements be charged in the indictment and submitted to the jury for its beyond-a-reasonable-doubt determination.

2. If the facts set forth in §848(b) are to be regarded as sentencing factors and not as elements of a separate offense, whether statutory factors which, if proven, extinguish the statutorily-prescribed sentencing range within which the district court would have had the discretion to sentence the defendant and replace it with a nondiscretionary mandatory statutory maximum sentence must, under the Due Process Clause of the Fifth Amendment, be submitted to the jury for proof beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 289 F.3d 1354 (11th Cir. 2002).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on May 3, 2002. Cano's timely petition for rehearing was denied on June 24, 2003. This Court has jurisdiction to review the judgment of the Eleventh Circuit on a writ of certiorari under 28 U.S.C. §1254(1).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

21 U.S.C. §848 provides, in pertinent part:

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

(b) Life imprisonment for engaging in a continuing criminal enterprise

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined, in accordance with subsection (a) of this section if –

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(2)(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, or organizers or leaders, received $10 million in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter –

(A) which are undertaken by such person in concert with five or more persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT OF THE CASE

This is a criminal case, over which the district court had jurisdiction under 18 U.S.C. §3231. After a jury trial, Cano was convicted of engaging in a continuing enterprise in violation of 21 U.S.C. §848, as well as of conspiracy and substantive drug and money laundering offenses. The §848 count of the indictment did not specify the subsection of §848 under which Cano was charged, but tracked the language of §848(c). Both the defense and the government argued Cano's motion for judgment of acquittal on the §848 count with reference to the elements of §848(c). In its summation, the government argued the elements of §848(c) to the jury, and the district court instructed the jury only as to the elements of §848(c). Notwithstanding the facts that Cano was not charged with a violation of §848(b) and that the jury was not instructed on the elements of §848(b), the district court, over Cano's objection, imposed upon Cano a §848(b) mandatory life sentence, stating that because the "jury was instructed on the requirements of §848(b)" the court did not have "much choice" other than to impose sentence under §848(b).[1]

On appeal, the Eleventh Circuit noted that Cano had raised the issue of whether, when the indictment did not charge the elements of §848(b) and the jury was not instructed as to those elements, imposition of a mandatory life sentence under §848(b) violated the due process principles announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *see* pages A-5 - A-6, *infra*, but did not address the issue.[2]

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[1] The district court also sentenced Cano to concurrent nonmandatory life terms on twelve other counts and to concurrent sentences of 240 months on the remaining counts.

[2] In so noting, the Court indicated that the question was subject to review for plain error. *See* pages A-5 - A-6, *infra*. On

REASONS WHY THE WRIT SHOULD BE GRANTED

The question whether 21 U.S.C. §848(b) creates a separate offense from that defined by 21 U.S.C. §§848(a), (c) is one which should be resolved by this Court. It is a crucial issue, as on its determination hinges whether the facts enumerated in §848(b) define elements of a separate offense which must be charged in the indictment and proven to a jury beyond a reasonable doubt before a defendant can be sentenced to a mandatory life term.

Should this Court conclude that §848(b) is not a separate offense, then another critical issue arises: whether a statutory factor which, if proven, extinguishes the statutorily- prescribed sentencing range within which the district court could have sentenced the defendant and replaces it with a mandatory minimum sentence equivalent to the statutory maximum sentence must be submitted to the jury for proof beyond a reasonable doubt. This question is one of central importance to the administration of criminal justice. The issue is presented here in the context of sentencing under 21 U.S.C. §848(b), which mandates the imposition of a life sentence, but the same, or similar, issues arise whenever a statute requires, if designated factors are present, that the sentencing court impose the statutory maximum sentence, thereby eliminating *all* judicial sentencing discretion. A decision by this Court regarding the issue presented here could, therefore, have broad implications in an array of

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the contrary, however, the record in this case clearly demonstrates that Cano fully preserved this issue for review, such that the Court's review should have been plenary. Cano also raised the issue of whether §848(b) is a separate offense from that defined by §§848(a), (c).

sentencing contexts. These are issues as to which there is a split among the circuits which should be resolved by this Court. The issue is also one which raises an important question left undecided by the Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Harris v. United States*, 536 U.S. 545 (2002), and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

I. SECTION 848(b) DEFINES A SEPARATE OFFENSE.

The first question which must be addressed is whether §848(b) defines a separate offense from that set forth in §§848(a), (c). If it does, then the factors set forth in §848(b) define the elements of that separate offense and, as such, must be charged in the indictment and submitted to the jury for its determination under the beyond a reasonable doubt standard. Only if these conditions are fulfilled may a sentence of mandatory life imprisonment be imposed on the defendant.

That §848 defines two separate offenses is apparent from the structure and language of the statute. First, only §848(a) is headed "Penalties;" it sets forth the penalties applicable to one who engages in a continuing criminal enterprise, as that term is defined in §848(c). The elements of the §848(a), (c) offense are: (1) the commission of a controlled substances violation (2) which is part of a continuing series of violations (3) undertaken in concert with five or more persons with respect to whom the defendant occupied a position of organizer, a supervisory position, or any other position of management, and (4) from which he obtained substantial income or resources. Importantly, §848(c) expressly provides that the definition of the offense set forth in that subsection is "*[f]or purposes of subsection (a) of this section* (emphasis added)." Thus, Congress specifically *excluded* subsection (b) from the subsection (c) definition of "continuing criminal enterprise."

When Congress drafted subsection (b), therefore, it created a separate definition of a separate, more serious, offense, which incorporates certain of the subsection (c) elements but redefines others. A defendant may be convicted under §848(b) only if he is "the *principal* administrator, organizer, or leader of the enterprise or is one of several such *principal* administrators, organizers, or leaders (emphasis added)." It does not suffice that he committed the triggering violation described in §848(c)(2)(A) or that he "obtain[ed] substantial income or resources" from the series of violations. Instead, the triggering violation must have involved "at least 300 times the quantity of a substance described in [21 U.S.C. §]841(b)(1)(B) . . . ." or, alternatively, "the enterprise, or any other enterprise of which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in [21 U.S.C. §]841(b)(1)(B) . . . ."

The disjunction between §§848 (a), (c) and §848(b) and Congress' modification of the definition of "continuing criminal enterprise" for purposes of §848(b), coupled with its express exclusion of §848(b) from the definition of "continuing criminal enterprise" set forth in §848(c), all point inexorably to the conclusion that §848(b) sets forth the elements of a separate offense. Indeed, the indicia that §848(b) defines a separate offense are stronger than those present in the statutory schemes which this Court analyzed in *Jones v. United States*, 526 U.S. 227 (1999), and *Castillo v. United States*, 530 U.S. 120 (2000).[3]

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[3] Only one circuit – the Seventh – has directly decided this issue, concluding that the factors enumerated in §848(b) do not define a separate offense but are instead simply sentencing factors which are not required to be submitted to the jury, even

II. EVEN IF SECTION 848(B) DOES NOT CREATE A SEPARATE OFFENSE, THE FACTORS ENUMERATED IN THAT SUBSECTION MUST, UNDER *APPRENDI*, BE CHARGED IN THE INDICTMENT AND SUBMITTED TO THE JURY FOR PROOF BEYOND A REASONABLE DOUBT.

The question whether a statutory factor which mandates that the district court impose the sentence otherwise prescribed as the top end of the statutory sentencing range – for example, as here, mandating a sentence of life imprisonment rather than leaving the judge with the discretion to sentence elsewhere in the 20 years to life range – is one that has divided the circuits. The Sixth Circuit held in *United States v. Flowal*, 234 F.3d 932 (6th Cir. 2000), that where the factor in question – there, the weight of the controlled substance involved in the offense – changed the sentencing range from 10 years to life to a mandatory minimum life sentence with no possibility of release, *Apprendi* required that that factor be decided by the jury beyond a reasonable doubt.[4] Other circuits have ruled that *Apprendi* does not apply

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in the wake of *Apprendi*. *United States v. Smith*, 223 F.3d 554 (7th Cir. 2000)(post-*Apprendi*); *United States v. Hardin*, 209 F.3d 652 (7th Cir. 2000)(pre-*Apprendi*), *vacated and remanded for reconsideration in light of Apprendi*, 531 U.S. 1135 (2001), *on remand, United States v. Robinson*, 39 Fed. Appx. 386 (7th Cir.), *cert. denied*, 537 U.S. 923 (2002), *and petition for cert. filed*, (August 8, 2003)(No. 03-5919). The Eleventh Circuit, although addressing a different issue, proceeded in *United States v. Elgersma*, 929 F.2d 1538 (11th Cir. 1991), *aff'd*, 971 F.2d 690, 691 n.1 (11th Cir. 1992)(*en banc*), as if §848(a), (c) and §848(b) defined separate offenses.

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In *United States v. Leachman*, 309 F.3d 377 (6th Cir. 2002), the Sixth Circuit overruled *Flowal* and other cases "to the

unless the application of the particular statutory factor at issue results in a sentence greater than the statutory maximum prescribed for the offense of conviction. *United States v. Sanchez*, 269 F.3d 1250, 1268 (11th Cir. 2001), *cert. denied*, 535 U.S. 942 (2002); *United States v. Harris*, 243 F.3d 806, 809 (4th Cir. 2001), *aff'd*, 536 U.S. 545 (2002); *United States v. Robinson*, 241 F.3d 115, 120-21 (1st Cir.), *cert. denied*, 534 U.S. 856 (2001); *United States v. Garcia-Sanchez*, 238 F.3d 1200, 1201 (9th Cir. 2001); *United States v. Smith*, 223 F.3d 554, 565 (7th Cir.2000); *United States v. Keith*, 230 F.3d 784, 787 (5th Cir.

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extent that they conflict with *Harris* [*v. United States*, 536 U.S. 545 (2002)] and this opinion." 309 F.3d at 383. While part of the reasoning on which *Flowal* relied is incompatible with the ruling in *Leachman*, its result is not. At issue in *Flowal* was the imposition of a mandatory minimum life sentence. In sharp contrast, in *Leachman*, the judicial determination of the number of marijuana plants for which the defendant was responsible simply increased the mandatory minimum sentence to ten years; the applicable sentencing range thereby became 10 years to life, and the district court sentenced the defendant to 10 years. The portion of the *Flowal* reasoning which the *Leachman* Court found incompatible with *Harris* was its generalized ruling that *Apprendi* applies whenever the factor at issue removes judicial discretion to impose a shorter sentence. That portion of the *Flowal* Court's reasoning was not, however, necessary to the result it reached. The result reached in *Flowal* also does not conflict with *Harris*. A statutory factor, which, if proven, removes *all* sentencing discretion by mandating the imposition of the highest sentence permissible under the statute presents a different question than that in either *Leachman* or *Harris*, in both of which the factor at issue raised the floor of the sentencing range but did not otherwise *require* the imposition of a particular sentence or remove *all* sentencing discretion from the sentencing court. *See* pages 10-11, *infra*.

2000), *cert. denied*, 531 U.S. 1182 (2001); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933-34 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000). Of these cases, only *Smith* dealt with a mandatory minimum life sentence. *See* note 3, *supra*.

A ruling that *Apprendi* applies to factors which, if proven, mandate the imposition of the statutory maximum sentence would be incompatible with neither *Harris v. United States*, 536 U.S. 545 (2002), nor *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). In both *Harris* and *McMillan*, the graduated penalty schemes under consideration increased the mandatory minimum sentence but did not increase the statutory maximum penalty. While such penalty schemes cabin the sentencing court's discretion, they do not eliminate it entirely. Moreover, the Court in *Apprendi* limited the reach of *McMillan* "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." 530 U.S. at 487 n.13. *See Harris*, 536 U.S. at 563. A mandatory statutory maximum sentence is, in a very real way, more severe than a nonmandatory statutory maximum sentence produced by operation of the guidelines in that the sentencing court is powerless to ameliorate it, no matter how compelling the circumstances, through exercise of its departure powers.

"Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of constitutional analysis." *Harris*, 536 U.S. at547. *See id.* at 546 (sentencing factors typically involve "incremental changes" that are meant to constrain the judge's discretion within a sentencing range by "identify[ing] matters for the sentencing judge's discretion"); *see also McMillan*, 477 U.S. at 83 (noting that mandatory minimum could be "more or less" than the sentence that the judge might otherwise have imposed). Where the presence of the requisite fact or facts dictates the nondiscretionary imposition of the statutory maximum sentence,

that fact or those facts merge the inner and outer limits of the sentence to be imposed – the mandatory minimum becomes the statutory maximum – and eliminate judicial sentencing discretion. Under such circumstances, that fact or those facts should be treated as "elements of the crime for purposes of constitutional analysis. There is an enormous difference between being subject to an incremental mandatory minimum within a baseline range depending on a sentencing factor – permitted by *Harris* and *McMillan* – and being subject to a mandatory statutory maximum sentence, with no discretion, no range, and no option. The same is even more true when the minimum mandatory sentence is the statutory maximum sentence.

Even if the Court were not inclined to apply *Apprendi* to all statutory sentencing schemes which extinguish judicial discretion in sentencing by mandating the imposition of the statutory maximum sentence if a certain factor or factors are present, it should do so where, as here, the mandatory minimum/statutory maximum sentence is life imprisonment. A mandatory minimum life sentence differs in kind and degree from the mandatory minimum sentence required by the type of statute at issue in *McMillan* and considered by the various circuits. When such mandatory minima are involved, the judge's sentencing discretion is decreased, but at least some, and sometimes a great deal, of discretion remains regarding where to sentence the defendant within the applicable range. By contrast, if the judge makes the necessary findings under §848(b), the statute – and the prosecutor's decision to invoke it – takes away all sentencing discretion and leaves the judge with only a single sentencing option, the imposition of a mandatory life sentence with no possibility of release.[5]

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[5] The rationale of *McMillan* does not, therefore, apply "with equal force" to §848(b), as the Seventh Circuit concluded

A mandatory life sentence differs from other statutory maxima in that once such a sentence is imposed, absent appellate reversal or collateral relief, the defendant will never be released. Such a sentence is, to be sure, less severe and less final than an executed death sentence, *cf. Ring v. Arizona*, 536 U.S. 584 (2002), but it does mean, to a virtual certainty, that the defendant will die in prison. The defendant's guidelines sentencing range can never be less than life imprisonment, and the district court has no power to ameliorate the severity of the sentence in an appropriate case through a downward departure, such as it could if the defendant's guidelines sentencing range was greater than the mandatory minimum sentence or if the guidelines called for a nonmandatory life term.

CONCLUSION

This Court should grant certiorari in this case to resolve the important questions which it presents regarding sentencing under 21 U.S.C. §848(b) and other sentencing schemes which mandate that, if a particular factor is found to exist, the sentencing court must impose the statutory maximum sentence. It should first consider whether §848(b) is a separate offense the elements of which must, consistently with the Due Process Clause of the Fifth Amendment and the jury trial and notice guarantees of the Sixth Amendment, be charged in the indictment and submitted to the jury for proof beyond a reasonable doubt. As addressed above, it is petitioner's position that §848(b) defines a separate, more severe, offence than do §§848(a), (c).

If the Court concludes that the facts set forth in §848(b) are sentencing factors rather than elements of a separate offense, it should then consider whether in cases such as this one, in

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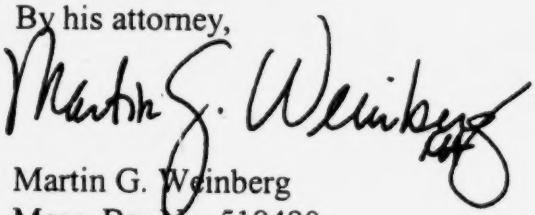
in *Smith*, 223 F.3d at 566.

which a statutory factor is so absolute as to remove all judicial discretion whatsoever from the sentencing court and to require that it impose the statutory maximum sentence, the Due Process Clause of the Fifth Amendment requires that that factor be found by the jury beyond a reasonable doubt. The Court should hold that, under such circumstances, it does. Where, as here, that statutory factor mandates that the sentencing court condemn the defendant to spend the rest of his life in prison, application of *Apprendi* is even more compelling.

Respectfully submitted,
By his attorney,



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[1] Although not reproduced herein on the document itself, this document bears, in the upper right-hand corner, the following stamp:

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U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUN 24 2003

THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-5458

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

LUIS CANO and DAVID MATOS,

Defendants-Appellants

Appeals from the United States District Court
for the Southern District of Florida

(May 3, 2002)

Before TJOFLAT and DUBINA, Circuit Judges and SHAPIRO, District Judge*

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*Honorable Norma L. Shapiro, U.S. District Judge, Eastern District of Pennsylvania, sitting by designation.

TJOFLAT, Circuit Judge:

On August 27, 1997, a Southern District of Florida grand jury returned a seventy-six count indictment against appellants, Luis Cano and David Matos, and eight others. The indictment was the culmination of a lengthy investigation into the operation of a nationwide cocaine trafficking and money laundering network.[1] Cano was charged in all seventy-six counts, and Matos

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[1] This was the fourth superceding indictment the grand jury returned against appellants. For convenience, we refer to it as the indictment. Appellant Cano was charged as follows:

> Count One: knowingly and intentionally operating a continuing criminal enterprise, from June, 1987 to October 1, 1996, in violation of 21 U.S.C. §§§§ 846, 841(a)(1), and 848.
>
> Count Two: knowingly and willfully conspiring to possess with intent to distribute a Schedule II controlled substance (cocaine), from February, 1987 to October 1, 1996, in violation of 21 U.S.C. §§§§ 841(a)(1) and 846.
>
> Count Three: knowingly and willfully possessing with intent to distribute a schedule II controlled substance (cocaine), from March, 1995 to May 27, 1995, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.
>
> Count Four: knowingly and willfully possessing with intent to distribute a schedule II controlled substance (cocaine), from July 1, 1993 to July 20, 1993, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.
>
> Count Five: knowingly and willfully possessing with intent to distribute a schedule II controlled substance (cocaine), from August 3, 1993 to August 28, 1993, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.

Count Six: knowingly and wilfully possessing with intent to distribute a schedule II controlled substance (cocaine), from September 7, 1993, to September 18, 1993, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.

Count Seven: knowingly and willfully possessing with intent to distribute a schedule II controlled substance (cocaine), from December 1, 1993 to December 13, 1993, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.

Count Eight: knowingly and willfully possessing with intent to distribute a schedule II controlled substance (cocaine), from February 1, 1994 to February 14, 1994, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.

Count Nine: knowingly and willfully possessing with intent to distribute a schedule II controlled substance (cocaine), from March 1, 1994 to March 31, 1994, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.

Count Ten: knowingly and willfully possessing with intent to distribute a schedule II controlled substance (cocaine), from April 10, 1994 to April 28, 1994, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.

Count Eleven: knowingly and willfully possessing with intent to distribute a schedule II controlled substance (cocaine), from October 1, 1994 to November 30, 1994, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.

Count Twelve: knowingly and willfully possessing with intent to distribute a schedule

in nine counts. A jury convicted Cano on sixty-nine counts, Counts 1 to 26, 28-31, 38-76; Matos was convicted on all nine counts in which he was charged, Counts 2, 4-10, and 12.[2] The jury based its verdicts, in part, on the testimony of several other members of the network.[3]

II controlled substance (cocaine), from January 1, 1995 to January 31, 1995, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.

Count Thirteen: knowingly and willfully possessing with intent to distribute a schedule I controlled substance (marijuana), from March 1, 1995 to May 31, 1995, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. §§ 2.

Count Fourteen: knowingly and willfully conducting and attempting to conduct financial transactions involving interstate and foreign commerce which the transactions involved the proceeds of a specified unlawful activity, from May, 1989 to October, 1, 1996, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 18 U.S.C. §§ 1956(h).

Counts Fifteen to Seventy-Six: sixty-two counts of money laundering, in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and (2).

Appellant Matos was charged with nine counts: Count Two, Counts Four through Ten, and Count Twelve

2

By the time appellants' case went to trial, three co-defendants had pled guilty, and five were awaiting trial.

3

Some of these witnesses testified after pleading guilty to charges contained in separate indictments; a few testified under letter grants of immunity.

Cano was sentenced to a mandatory life prison term on Count 1, and to concurrent life sentences on Counts 2-13. Additionally, he received a concurrent term of 240 months' imprisonment on Counts 14-26, 28-31, and 38-76. Matos received on each count a concurrent term of 235 months' imprisonment. Cano and Matos now appeal. They seek new trials or, alternatively, re-sentencing on several grounds.[4] Only

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[4] Cano claims as follows: (1) Counts 2-13 fail to state an offense; (2) the evidence was insufficient both to establish venue and to convict on Counts 3-6, 8-10, & 12; (3) the district court abused its discretion in permitting Detective Donnelly to "interpret" the "money house" ledgers, and Schery's date book and phone book; (4) misconduct of the prosecutor denied him a fair trial, to-wit: (a) vouching for the credibility of prosecution witnesses on direct examination and during closing argument, (b) staging a "demonstration" in closing argument, (b) staging a "demonstration" in closing argument, (b) staging a "demonstration" in evidence, (c) attempting to have Ruben Carillo refresh his recollection with a ledger maintained by a Colombian, "J.J.," one of Ruben Carillo's lieutenants, and (d) attempting to have Burnbaum recite the facts underlying Wilfredo Schery's previous conviction and to use the facts as substantive evidence; (5) the district court committed plain error in failing to instruct the jury that, to convict the defendant on Count 1, it had to find unanimously that the defendant committed a continuing series of at least three violations of federal narcotics laws; (6) the district court committed plain error under *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), in imposing life sentences under 21 U.S.C. §§ 841(b)(1)(A) on Counts 2-13 because the drug quantities giving rise to the sentences were not alleged in the indictment and found by the jury beyond a reasonable doubt; (7) the court committed plain error under *Apprendi,* in imposing a life sentence on Count 1, the 21 U.S.C. §§ 848 offense, because the elements of 848(b), which triggered the life sentence, were

two grounds merit discussion: (1) whether the district court abused its discretion in permitting a police detective to interpret drug ledgers, a personal phone book and date book seized by New York City Police Department ("NYPD") detectives while conducting searches of the network's facilities in the New York City vicinity; and (2) whether the prosecutor impermissibly vouched for the credibility of government witnesses. We resolve these issues in favor of the Government. We notice plain error on a third issue: whether the record contains any evidence to support Cano's conviction on Count 13, possession with intent to distribute marijuana.

I.

In 1989, Cano and Ruben Carillo, both experienced cocaine traffickers, began distributing large amounts of cocaine.

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not alleged in the indictment and found by the jury beyond a reasonable doubt; and, (8) the court committed plain error in failing to group (under the Sentencing Guidelines) the drug-related counts with the money laundering counts in fashioning Cano's sentences.

Appellant Matos claims that: (1) the evidence was insufficient to convict on Counts 4-8; (2) as in Cano's appeal, the evidence failed to establish venue for Counts 4-6, 8-10, & 12; (3) the court committed plain error under *Apprendi,* in imposing a term of supervised release in excess of the statutory maximum because the indictment failed to allege drug quantity and the quantity issue was not submitted to the jury. In addition to these claims of error, Matos adopts Cano's points (3) and (4).

With the exception of Cano's claims 3 and 4(a) (both of which Matos has adopted), which we address in the text *infra,* none of appellants' claims of error has merit or warrants discussion.

Carillo's sister, Amanda, who had become Cano's mistress, introduced the two men. As it turned out, unbeknownst to them, Cano and Carillo had previously been involved together in the distribution of cocaine in New York City; Cano had been supplying a middleman with multi-kilograms of cocaine, often in excess of 100 kilos, and the middleman, in turn, had been allocating portions of the shipments to Carillo.[5] When the middleman learned that Cano and Carillo had become aware of their respective roles in the distribution network, he quit supplying Carillo. Carillo solved this supply problem by arranging for a Colombian source, "Potato," to supply him and Cano with cocaine.

New York City was the primary destination for Cano's shipments. Cano maintained two houses in the New York City vicinity: a "money house" where all the cash was held and the bookkeeping for the operation took place, and a "stash house" where the cocaine was stored. Claudia Valencia was the operation's bookkeeper and lived and worked in the "money house;" she prepared the ledgers, which were eventually seized by the police during a search and introduced into evidence at trial.[6] [FN6] Cano and Carillo had a family reside in the "stash house" in an effort to curb any suspicion about the activities taking place there.

Ruben Carillo supervised the distribution of drugs in the New York City area by telephone from Colombia, where he stayed from 1991 to 1994 to secure the needed cocaine supply. In effect, Carillo was the vice president of Cano's operation, with

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Ruben Carillo was indicted in a separate case, pled guilty, and became the principal prosecution witness at appellants' trial.

6

We describe the ledgers at note 9, *infra*.

Cano serving as president. Wilfredo Schery, Cano's brother-in-law, supervised the network's operations in the New York area and reported directly to Carillo.[7]

In May 1990, Cano received a 750 kilogram shipment of cocaine from Potato; it was flown to an airstrip near Houston, Texas. Cano, Matos and others met the airplane. The cocaine was off-loaded, taken to a stash house, and subsequently transported by truck to New York City. From the sales that took place there, Cano reaped over $6 million; Carillo received roughly $1.5 million.

From 1992 to April 1994, Cano arranged for regular biweekly shipments-- containing 300 to 1,000 kilograms--to New York City. The shipments were made by O.B. Industries, a company Cano had acquired to provide cover for his illicit activities, from its elastics factory in Miami and its facilities in Los Angeles and Texas. The O.B. Industries' facilities in these locations served as Cano's distribution centers;[8] the cocaine was transported to New York City within pallets of elastics. For every shipment to New York City, Cano received $1,000 per kilogram. The shipments sent from the factory in Miami involved over 10,000 kilograms.

Meanwhile, the NYPD had maintained an active wiretap on Schery's cellular telephone in the New York City area, and both Cano and Matos were recorded discussing their cocaine trafficking business. The wiretap was supervised by Detective Eugene Donnelly. On April 5, 1994, the NYPD arrested Schery and Valencia and seized, at the "stash house," 297 kilograms of

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[7] Schery also kept Cano informed.

[8] O.B. Industries continued to operate its elastics factory after Cano acquired the company. Cano used the company as a front to hide his cocaine distribution.

cocaine, and, at the "money house," over $1.2 million and two drug ledgers that were introduced into evidence at appellants' trial.[9] A search of Schery's residence yielded $36,000 in cash, one kilogram of cocaine, and several incriminating documents, all relating to drug transactions. Among these documents were "business cards," including a card for O.B. Industries, "receipts," and Schery's "date book"[10] and "phone book."[11]

9

These were the same ledgers kept by Claudia Valencia, the bookkeeper. They were admitted without objection; thus, their admission is not an issue on appeal. The ledgers, containing several pages, cover the periods "February 1 through April 5" and "July 13 through February 4." The undisputed evidence is that the first period was in 1994; the second was in 1994-95. The ledger sheet for February 1-24, 1994, reading from left to right, contains columns with the following headings:

> "February" "Vienen" "Macua" "Gallo" "Homie" "Wolf" "Nicky" "Kiko" "Family" "Recibido" "Entregado" "Balance"
>
> Under the headings "February," "Vienen," "Macua," and "Balance" are the following entries for "Macua" on February 1:
>
> "Feb 01" "Pago Telefonos" [under "Vienen "] "1567" [under "Macua"]----------"824571" [under "Balance"]
>
> "01" "Rent apt. city" [under "Vienen"] "1000" [under "Macua"]---------- "823571" [under "Balance"]
>
> According to the testimony of several prosecution witnesses, including Ruben Carillo, "Macua" was Ruben Carillo; "Gallo" was Cano.

10

The "date book" and the "phone book" are different parts of the same book. However, for convenience we refer to them

separately because the prosecution introduced them into evidence as separate exhibits.

The "date book" is a calendar in book form. The pages of the book are divided into blocks representing the days of the month. The blocks are large enough to accommodate several notations. A block for a typical day includes one or more of the following notations: the names of persons who have purchased cocaine from the Cano organization, a code in hieroglyphics representing numbers regarding quantity, money owed or received, or phone numbers.

11

The phone book is a "Day Runner" with lettered tabs in alphabetical order separating groups of pages. Each tab contains two letters, e.g., AB, CD. On the page to which the tab is attached, ample space is provided to record names, phone numbers, and notations. A typical entry includes the following: a name followed by hieroglyphic numbers (as in the "date book"), and B or P with hieroglyphics. Two of such entries were followed by a number in parentheses, e.g., (109).

Following the last tab, XYZ, there is a section with lined pages with the heading in the upper left hand corner of each page entitled "NOTES." The words "DIARY/IDEAS" appears directly beneath NOTES. Opposite NOTES to the right is a rectangular box containing this entry: "Subject _____" A handwritten entry appears after "Subject" and over the line in each box, e.g., "Company," "Homey," "Personal," "Personal bills," "House # 1," and "House # 2." On the pages in which "Company" is the subject appear dated hand notes. The dates are in Arabic numerals. Hieroglyphics appear under names written opposite the dates. For example, opposite "12/13" appears "Hernan de Felipe # 54(50)." (Under this entry appear 10 hieroglyphics, the first three of which are closed by a

Notwithstanding the arrests in New York, Cano kept the network functioning. Among other things, he had Matos spend part of his time in Los Angeles, receiving cocaine at the O.B. Industries facility there and shipping it to New York City. For his efforts, Matos received $100 for every kilogram shipped.
In January 1995, with Carillo back in the United States, Cano took on the additional responsibility of transporting his supplier's cocaine from Colombia to the United States. For undertaking this task, he took forty percent in kind of each shipment. In the first month, his workers smuggled 1,100 kilograms of cocaine into Texas from Mexico. His share, 440 kilograms, yielded $7 million. Texas law enforcement officials intercepted and seized the next shipment from Mexico, 2,600 pounds.

In April 1995, Cano's network began to unravel. That month, Cano shipped 150 kilograms of cocaine to Chicago. One of his workers there, Osvaldo Marcial, stored the cocaine. A few days later, Marcial was arrested and jailed on unrelated charges. Cano learned of the arrest but refrained from contacting Marcial at the jail--to determine where he had stashed the cocaine--for fear of being overheard. Instead, he decided to have his attorney, Michael Burnbaum, posing as Marcial's lawyer, visit Marcial at the jail. Burnbaum could have a private conversation with

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parenthesis). A line beneath that line also has ten hieroglyphics arranged in the same fashion.

Marcial and find out where he had stored the cocaine. Cano had confidence in Burnbaum's ability to do this because Burnbaum had been an Assistant United States Attorney.[12] Unbeknownst to Burnbaum (and Cano), however, Marcial was cooperating with law enforcement and, after Burnbaum met him at the jail, he reported the meeting to the authorities. The intelligence Marcial provided law enforcement led to several arrests--including the arrests of Cano, Matos, Burnbaum, and Ruben Carillo.

II.

A.

Appellants contend that the district court abused its discretion in permitting Detective Donnelly, the NYPD detective in charge of the case,[13] to decipher, over their objection, what Donnelly and counsel referred to as "hieroglyphics"--symbols contained in the phone book previously introduced into evidence along with the ledgers and date book we have already described.[14] Appellants objected to such deciphering on two grounds: (1) that, under Rule 702 of the Federal Rules of

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12

Burnbaum had been an assistant in the United States Attorney's office in the Southern District of Florida and had handled scores of drug cases.

13

Donnelly was the case agent. Among other things, he supervised the conduct of the several wiretaps placed on the telephones used by the conspirators, and ran down the tips the monitored conversations yielded.

14

See supra notes 9, 10 and 11.

Evidence, [15] the deciphering constituted "expert" testimony by a witness who had not been qualified as an expert; and (2) that the prosecutor had not notified them that Donnelly would be called as an expert witness or provided them with his qualifications and a summary of his testimony, as required by Rule 16 of the Federal Rules of Criminal Procedure.[16] The prosecutor

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15

Rule 702, Testimony by Experts, states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

16

Rule 16, Discovery and Inspection, states:

(a) Governmental Disclosure of Evidence.

(1) Information Subject to Disclosure.

(E) Expert Witnesses. At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written

responded to appellants' objection by representing that Donnelly was not being called as an expert; all he was going to do was decipher the hieroglyphics--by correlating the ten digit telephone numbers of members of the conspiracy (obtained from the wiretaps) with the ten hieroglyphic symbols opposite their names in the phone book. On the basis of the prosecutor's representation, the court overruled appellants' objection, concluding that Donnelly would not be testifying as an expert witness.

After the court ruled, Donnelly testified as follows. First, he explained how he deciphered the hieroglyphics. Using wiretap information, he selected the telephone numbers associated with two of the members of the conspiracy, Homey and MiLagro, whose names appeared in the phone book.[17] Their telephone numbers had ten digits. Looking at the phone book, he found the conspirator's name and aligned the ten digits (contained in the conspirator's phone number) with the hieroglyphic symbols appearing opposite the name; then, going from left to right, he

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summary of testimony the government intends to use under Rules 702, 703, or 705 as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subdivision shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

17

Homey was identified by Ruben Carillo as the network's best customer in the New York City area. MiLagro was identified by Donnelly as MiLagro Tavares, a female who resided in the same geographic area. A conversation in which she had been a party had been intercepted during one of the wiretaps. Homey and MiLagro were unindicted co-conspirators.

assigned an arabic number to each symbol.[18] [FN18] When he compared the symbols and phone numbers for these conspirators, he discovered that each symbol represented a specific arabic numeral. In demonstrating how he deciphered the hieroglyphics,[19] Donnelly used a poster board the prosecutor's office had prepared.[20] The board had a line of ten numbers, zero to nine, going left to right. A hieroglyphic symbol, representing a specific arabic numeral, appeared above each numeral.

We agree with the district court that Detective Donnelly's deciphering of the hieroglyphics was not based on "scientific, technical or otherwise specialized knowledge." Therefore, the deciphering did not constitute expert testimony within the meaning of Rule 702, and the court did not abuse its discretion in overruling appellants' Rule 702 objection.[21] We acknowledge

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18

Consider hypothetically the phone number 017 334-5651. If a delta,"▲," symbol was the first hieroglyphic (going from left to right), then the delta represented the number "0".

19

At times, counsel referred to Donnelly's deciphering as "breaking the code."

20

Defense counsel objected to the poster board being shown to the jury on the ground that the board had been "prepared in anticipation of litigation [i.e., appellants' trial]," meaning that, because someone in the prosecutor's office had prepared it beforehand, it was therefore inadmissible. The court overruled the objection, and appellants do not challenge the ruling here.

21

During his appearance on the witness stand, Donnelly did testify about the NYPD's investigation of Cano's network--the wiretaps; the surveillance of network activities; and the

that some courts have considered the interpretation of drug ledgers to constitute expert testimony, but in these cases the expert used previously acquired experience or specialized knowledge to interpret the ledger's notations.[22] *See e.g., United*

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searches of the "money house," the "stash house," and Schery's apartment, which yielded the ledgers and Schery's phone book and date book, and which were introduced into evidence. This testimony, however, played no role in the hieroglyphics deciphering appellants are challenging.

22

Appellants cite the following cases to argue that "Donnelly's deciphering of the telephone codes, explanations of the roles various persons played, and interpretations of the ledgers fall squarely within the domain of what is generally regarded as expert testimony by a law enforcement officer: *United States v. Chastain,* 198 F.3d 1338, 1348 (11th Cir.1999); *United States v. Ortega,* 150 F.3d 937, 943 (8th Cir.1998); *United States v. Sanchez-Galvez,* 33 F.3d 829, 832 (7th Cir.1994); *United States v. Tejada,* 886 F.2d 483, 486-87 (1st Cir.1989); *United States v. Carmona,* 858 F.2d 66, 69 (2d Cir.1988)."

The expert testimony of the United States Customs Agent in *Chastain* did not involve any interpretations of notebook entries. Instead, the agent testified about "general techniques of drug smugglers" and certain alterations that made an airplane more suitable for smuggling. *Chastain,* 198 F.3d at 1349. The testimony in *Sanchez-Galvez* involved generalized expert testimony on the roles and modus operandi of drug dealing operations. *Sanchez-Galvez,* 33 F.3d at 832. The law enforcement expert in *Tejada,* as indicated in the above text, testified as to codes found within a notebook based upon his experience and familiarity with the language of the cocaine community. *Tejada,* 886 F.2d at 486-87. Finally, in *Carmona,* a detective testified as

an expert as to the meaning of the entries in a notebook. Although the court's opinion does not discuss his experience, it directly cites *United States v. Nersesian,* 824 F.2d 1294, 1307-09 (2d Cir.1987). *Carmona,* 858 F.2d at 69. In *Nersesian,* the detective testified that drug slang in wiretap conversations was wholly based upon his experience:

> [H]e pointed out that caution, pauses, excessive use of pronouns, and the participants' apparent knowledge of what they were talking about were indicia that could be relied upon in assessing whether a conversation was drug-related. He also identified certain key words or phrases used in certain intercepted conversations as narcotics-related. For instance, he testified that, depending on the context, words such as cheese, land, room, house, car, horse, and stick-shift, could carry a hidden meaning related to narcotics.

Id. at 1307.

In addition to the fact that Donnelly did not testify based on his experience, we note that our court has recently held that expert and lay testimony, under the Federal Rules of Evidence, are not mutually exclusive (at least with the pre-amendment Rule 701; Rule 701 was amended in 2000 by adding 701(c) to eliminate confusion between Rules 701 and 702). In other words, we stated that lay opinion testimony is not precluded simply because an expert could testify to the same subject at issue. *See United States v. Novaton,* 271 F.3d 968, 1008 (11th Cir.2001). The defendants in *Novaton* objected to law enforcement agents testifying about the meaning of certain code in recorded at 1007. The court rejected the "erroneous assumption ... that because an

States v. Ortega, 150 F.3d 937, 943- 44 (8th Cir.1998) (allowing expert testimony of law enforcement agent as to meaning of coded language based on experience); *United States v. Tejada,* 886 F.2d 483, 486 (1st Cir.1989) (finding admissible the expert testimony of agents who used their experience with the "lexicon of the cocaine community" to interpret coded words within a notebook). Unlike the witnesses in these cases, Donnelly did not testify as to general drug trafficking techniques, "code" or "slang" words, or use his experience as a narcotics detective to decipher the "hieroglyphics." Donnelly simply took telephone numbers and names from the wiretaps and compared them to the same names in Schery's phone book and to the hieroglyphics appearing next to those names. No scientific, technical or specialized knowledge was required to accomplish this. In a sense, Donnelly did precisely what the prosecutor invited the jury to do in closing argument; the jurors were asked to perform the same exercise Donnelly had carried out in their presence and break the code themselves.

B.

Appellants contend that, if Donnelly's testimony was not that of an expert, it constituted the opinion testimony of a lay witness but failed to satisfy one of the criteria of Rule 701 of the Federal Rules of Evidence, Opinion Testimony by Lay Witnesses. The version of Rule 701 in effect at the time of appellants' trial stated:

> If the witness is not testifying as an expert, the witness'

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expert could provide the type of testimony at issue, a lay witness cannot. Our case law is squarely to the contrary." *Id.* at 1008.

> testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Fed.R.Evid. 701 (amended 2000).

The unsatisfied criterion, appellants say, was the requirement that the witness' testimony be "based on the perception of the witness." Fed.R.Evid. 701(a). Appellants are right; in deciphering the hieroglyphics, Donnelly did nothing more than call the jurors attention to the fact that the hieroglyphics appearing next to the names of two of the conspirators, Homey and MiLagro, in Schery's phone book represented their telephone numbers. For example, "▲" represented the number "0." Nothing in the inferences Donnelly drew was based on his perception; rather, the inferences were based on facts already in evidence. As we have observed, Donnelly merely delivered a jury argument from the witness stand.

The problem appellants face is that they did not object to Donnelly's deciphering on this Rule 701 ground.[23] We therefore

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[23] Appellants face the same failure-to-object problemconcerning Donnelly's use of the hieroglyphics and arabic numerals to infer that many of the entries in Schery's phone book and date book represented cocaine transactions. After Donnelly deciphered the hieroglyphics, the prosecutor asked him to explain the meaning of the asterisks and boxes containing an "X" next to arabic numbers or hieroglyphic symbols in the "Notes" section of Schery's phone book and date book. Donnelly said that the arabic numbers or symbols next to the asterisks represented quantities of cocaine; the boxes next to symbols represented monies received or owed for sales of

cocaine. On cross-examination, when faced with apparent contradictions in his testimony, Donnelly acknowledged the inconsistencies (admitting, for instance, that some asterisks represented money, not cocaine) but explained that Schery had erred in making some of the entries in the books. In other words, Donnelly was telling the jury what Schery actually intended to do. Although Donnelly's responses amounted to rank speculation (about Schery's state of mind and whether the asterisks and boxes concerned cocaine or money), appellants did not object. Instead, they have complained for the first time on appeal, contending that this testimony constituted expert testimony under Fed.R.Evid. 702, and, alternatively, that the testimony did not satisfy the "perception" criterion of Fed.R.Evid. 701(a). We review the admission of lay testimony for abuse of discretion. *See United States v. Novaton,* 271 F.3d 968, 1009 (11th Cir.2001).

Had appellants objected at the time the prosecutor elicited the testimony, the court would have sustained the objection, since it was not a matter within Donnelly's expertise--and, thus, did not amount to expert testimony--and, moreover, constituted pure speculation. Donnelly's responses were absolutely harmless, however. The jury knew that Schery's "business" was distributing cocaine; hence, that the asterisks and boxes dealt with cocaine and money was obvious. And other evidence in the case well-established the amounts of cocaine being trafficked and the money the trafficking was bringing in. Assuming that the district court should have struck Donnelly's speculative testimony--because Donnelly lacked (1) the expertise to render his (speculative) opinions under Rule 702, (2) the required "perception" under Rule 701(a), and because his speculations lacked any probative value--error did occur and the error was plain, so as to render the court's entertainment of

review the court's decision to allow the testimony under a plain error standard. We may vacate appellants' convictions if (1) there was "error," (2) which was "plain," (3) and which affected appellants' "substantial rights." *Johnson v. United States,* 520 U.S. 461, 466-67, 117 S.Ct. 1544, 1548-49, 137 L.Ed.2d 718 (1997). If these three conditions are met, we may exercise our discretion and remedy the error if the error "seriously affect[s] the fairness, integrity, or public reputation of [the] judicial proceedings." *Id.* at 467, 117 S.Ct. at 1549 (quoting *United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993)). In this case, because the evidence of appellants' guilt was overwhelming, the error did not affect appellants' substantial rights, and we provide no remedy.

III.

Appellants next aver that prosecutors vouched for the credibility of six government witnesses while examining the witnesses on direct and on redirect, and while giving their closing argument. The record hardly contains an objection.[24] In

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Donnelly's statements an abuse of discretion. We conclude, however, that Donnelly's statements did not affect appellants' substantial rights.

[24] In his brief, Cano states that only three objections were lodged on his behalf. Matos concedes that no objections were made by his counsel. One of Cano's objections was during the testimony of Osvaldo Marcial; two took place during the testimony of Burnbaum. No objections were made throughout the testimony of Ruben Carillo, Tania Mohler, Amanda Carillo, and Michael Stricklin.

One of Cano's objections, made during Burnbaum's testimony on redirect, was sustained:

fact, counsel for Matos never objected to the alleged vouching. Despite the paucity of objections in Cano's case and the total absence of objections in Matos' case, however, we give appellants the benefit of the doubt and afford them plenary review. *See United States v. Diaz,* 190 F.3d 1247, 1254 (11th Cir.1999) (stating that plenary review is proper because vouching is a mixed question of law and fact).

Five of the six witnesses appellants identify were accomplices who testified for the prosecution after having pled guilty to a charge (in the instant case or a separate case) or under a letter grant of immunity.[25] [FN25] They were Ruben Carillo, Tania Mohler (Ruben's wife), Michael Burnbaum, Amanda Carillo (Cano's mistress and Carillo's sister), and Michael Stricklin (Cano's worker). The sixth witness was Osvaldo Marcial; he had been indicted and intended to plead guilty in hopes of receiving for his testimony a sentence reduction under Rule 35 of the Federal Rules of Criminal Procedure. During the

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Q. In addition you were advised that if you committed perjury you would be charged with it.

A. Absolutely.

Q. Do you know how many cases I have prosecuted as an Assistant United States Attorney for perjury?

A. I do not.

Mr. Diaz [Cano's defense counsel]: Judge, wait, I object to Ms. King's being a witness in this case.

THE COURT: Sustained.

25

Immunity was granted to Amanda Carillo and Stricklin by letters signed by the United States Attorney.

direct examination of the witnesses who had pled guilty and had been sentenced, the prosecutor, as is usually the case, introduced the plea agreement (if applicable) and had the witness elaborate on what had transpired. The same was true with the accomplices who had pled, but had not been sentenced, and likewise with those testifying on a grant of immunity.[26] [FN26] The cross-examination was conducted along the usual lines-- the implication being that the witness was lying in order to obtain favorable treatment. Sometimes the prosecutor, on redirect if it was within the scope of the cross- examination, brought out the fact that the witness could be charged with perjury or emphasized that no promises had been made other than those contained in the plea agreements and letters of immunity (documents which had been introduced into evidence on direct examination).[27]

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[26] The following is a typical example, occurring during Amanda Carillo's testimony on direct examination, of the alleged vouching:

> Q. Have you been told what would happen if you did not tell the truth?
>
> A. Yes.
>
> Q. And what is that?
>
> A. That I could be charged.
>
> Q. Have any promises been made to you, Ms. Carillo?
>
> A. No, none.
>
> Q. Have you been charged as of this date?
>
> A. No, none.

[27] The same techniques were used by both the prosecution and defense on Marcial, even though he did not enter into a plea agreement or testify under a grant of immunity.

Appellants also contend that the prosecutor's remarks in closing argument constituted vouching:

> All these cooperating witnesses have come in. We don't come in here and say to you that you should believe Ruben Carillo-Rosales because he is a nice guy, a good guy or any reason such as that.
>
> Ladies and gentlemen, the man came in here, as has every cooperating witness, looking for something; namely a reduction in their sentence.
> They have come in here. They have agreed to plead guilty. We have a number of their plea agreements which you will see. They are going to go back [to the jury room].
>
> Take a look at the terms. It is required that these defendants, cooperating witnesses, come in and tell the truth, get on the witness stand and talk to you truthfully or the government can charge them with perjury, we can get them with obstruction of justice, we can do a lot of things.
>
> You are going to hear a lot of talk from the defense about how the government basically gets in bed with these people, how we give them the world, how we don't care if they lie on the witness stand.
> Ladies and gentlemen, they are required to tell the truth. Yes, the assessment lies with the United States Government whether to file a motion to reduce their sentence. Defendants can't do it. The Judge can't do it. The United States Government is the only one with the power to do that.

We review a claim of vouching under a standard set out in *United States v. Castro,* 89 F.3d 1443 (11th Cir.1996). Vouching occurs when:

> "[T]he jury could reasonably believe that the prosecutor was indicating a personal belief in the witness's credibility." *United States v. Sims,* 719 F.2d 375, 377 (11th Cir.1983), *cert. denied* 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984). In applying this test, we look for whether (1) the prosecutor placed the prestige of the government behind the witness by making explicit [personal] assurances of the witness's credibility, or (2) the prosecutor implicitly vouched for the witness's credibility by implying that evidence not formally presented to the jury supports the witness's testimony. *Sims,* 719 F.2d at 377.

Castro, 89 F.3d at 1457.

Appellants' claims fail to meet either standard of the test. The prosecutor only questioned the witnesses regarding the truth-telling portions of their plea agreement and brought out the fact that the agreements stated they were subject to perjury. No jury could reasonably believe these types of questions put the prestige of the government behind each witness or indicated that the prosecutor was implying there was evidence beyond what was presented to the jury that supported the witness' testimony. The alleged vouching in the testimony at hand is similar to the testimony complained of in *Castro:*

> In this case, the prosecutor merely questioned Gelber about the requirements of the plea agreements to testify fully and truthfully. Furthermore, in his questioning of Gelber, the prosecutor merely pointed out that Gelbert risked prosecution if he perjured himself. We have found similar questioning proper. *See United States v. Sims,* 719 F.2d 375, 377 (11th Cir.1983), *cert. denied,*

465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984).

Castro, 89 F.3d at 1457.

Moreover, we have found it proper for the prosecution to rehabilitate the witness on direct examination if defense counsel attacks the witness' credibility during the opening statement. *See United States v. Delgado,* 56 F.3d 1357, 1368 (11th Cir.1995). As in *Delgado,* the record here discloses vitriolic remarks during defense counsel's opening statements concerning the character and credibility of government witnesses, referring to them as "snitches," "criminals," "master[s] of manipulation," and informants with an "axe to grind."

As for the remarks in closing argument, it becomes obvious from a reading of the record that appellants' principal argument to the jury in closing would be that none of these witnesses--continually called "snitches" throughout appellants' closing arguments--were worthy of belief. The evidence of guilt was so overwhelming that attacking these witnesses was about all defense counsel could do. In other words, counsel concentrated on the credibility of these witnesses and ignored the prosecution's other evidence. In fact, in rebuttal argument, the prosecutor invited the jury to disregard the accomplice testimony altogether and to focus on the other evidence, contending that such other evidence was so strong that the jury could convict on it alone.

Even if the prosecutor's questions during examination and remarks at closing constituted vouching, we hold that they were harmless and did not prejudice any substantial right of the defendants. Consequently, we find that no prosecutorial misconduct occurred with respect to impermissible vouching.

IV.

Count 13 of the indictment charged Cano with possession with intent to distribute marijuana from March 1 to May 31, 1995. Cano was convicted on that count and the district court sentenced him to life imprisonment pursuant to 21 U.S.C. §§ 841(b)(1)(A). Neither the presentence investigation report ("PSI") nor the record of the sentencing hearing established that Cano possessed any quantity of marijuana during that time period. Although Cano's defense counsel did not raise this issue on appeal, and the Government has ignored the point, we review it for plain error.

We find plain error. The absence of any evidence to support the charge constitutes error. The error is plain, affects Cano's substantial rights,[28] and affects the fairness, integrity, and public reputation of the proceeding on Count 13. Cano's conviction on that count is therefore vacated.

V.

For the foregoing reasons, the district court's judgment against Cano on Count 13 is VACATED, and the district court is directed to dismiss the count. Appellants' convictions and sentences are otherwise AFFIRMED.

SO ORDERED.

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[28] We note, however, that this does not make any practical difference, since Cano was sentenced to thirteen concurrent life sentences, including the marijuana charge. With Count thirteen vacated, he will serve twelve concurrent life sentences.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 98-5458-II

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

LUIS H. CANO,
DAVID MATOS,

Defendants-Appellants

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE TJOFLAT and DUBINA, Circuit Judges and SHAPIRO*, District Judge

PER CURIAM:

The petition(s) for rehearing filed by Luis Cano is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable Norma L. Shapiro, U.S. District Judge, Eastern District of Pennsylvania, sitting by designation.